JUDGE'S COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAMONT FOX and LAURA FOX, h/w	:	CIVIL ACTION
v.	:	
JOHN McGRATH, et al.	:	NO. 99-4838

MEMORANDUM AND ORDER

McLaughlin, J. June 12, 2002

This case arises out of the prosecution of Lamont Fox, a Philadelphia police officer, for two counts of perjury before a grand jury. He was later acquitted of the charges. Fox has brought this civil rights action against Philadelphia police officers John McGrath and Cynthia O'Leary, and the City of Philadelphia.

Fox claims that Officers McGrath and O'Leary made knowingly false statements designed to implicate Fox in an alleged assault, and disseminated those statements to investigators, **which** led to **Fox's** indictment, arrest and trial. He has sued each officer under state and federal law for conspiracy, malicious prosecution and false arrest. **Fox** also

claims that the City of Philadelphia forced him to testify before the grand jury, in violation of his state and federal constitutional rights against self-incrimination.

Presently before the Court is the defendants' motion for summary judgment. The Court will grant the motion with respect to the federal claims and will remand the state claims to the Court of Common Pleas.

I. Facts[1]

Lamont Fox became a member of the Philadelphia Police Department on or about June 22, **1987.** In April **1993,** Fox was a member of a group of officers known as "Five Squad" in the 14th Police District.

On the night of April 20, 1993, defendants John McGrath

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[1] A motion for summary judgment shall be granted where the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). The moving party has the initial burden of demonstrating that no genuine issue **of** material fact exists. Once the moving party has satisfied this requirement, the non-moving party must present evidence that there is a genuine issue of material fact. The non-moving party may not rest on the pleadings, but must go beyond the pleadings in presenting evidence **of** a dispute of fact. Celotex Corp. v. Catrett, 477 **U.S.** 317, 323-324 (1986). **In** deciding a motion for summary judgment, the court must view the facts and "any inference to be drawn from the facts contained in depositions and exhibits" in the light most favorable to the non-moving party. Josey v. John R. Hollingsworth, 996 F.2d 632, **637** (3d Cir. **1993).**

and Cynthia O'Leary, also members of the Philadelphia Police Department, had been assigned to the 14th District Emergency Patrol Wagon. In response to a radio call, they arrived at the rear of 5623 Germantown Avenue in Philadelphia. They were called there to pick up Lawrence Jones, who had been arrested at the Leather and Fur Ranch. Michael Vassallo, the sergeant then in charge of Five Squad, was involved in the arrest.

In or about March 1997, the police department's Internal Affairs Division ("IAD") began an investigation into allegations against Vassallo, including that Vassallo assaulted Jones and violated his civil rights during the arrest on the night of April 20, 1993. Aloysius Martin, an officer assigned to the IAD, handled the investigation.[2] He interviewed McGrath and O'Leary, among others. Both McGrath and O'Leary stated that, after they arrived at the scene on April 20, 1993, Jones was placed in the rear of their vehicle and assaulted by Vassallo. McGrath also stated that: "There were other Police Officers on location, but I am not sure who they were. I believe they were Officer Lamont Fox and Officer Charles Yeiter." Def. Ex. 3A, at

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[2] Martin was originally named as a defendant in the case. However, in Fox's opposition the defendants' summary judgment motion, he noted that discovery had failed to disclose facts sufficient to continue his claims against Martin, and withdrew all claims against him. Pl. Opp'n Br. at 10 n.6.

1. O'Leary did not place Fox at the scene, but stated that: "From what I recall the other Officers there were assigned to five squad. I can't recall the specific Officers that were on the scene." Def. Ex. 3B, at 1.

The investigation was stopped before a conclusion was reached at the police department level, and was turned over to the FBI. A federal grand jury was eventually convened to investigate the allegations against Vassallo. Both McGrath and O'Leary were subpoenaed to testify before the grand jury.

On August 6, 1997, six days before McGrath testified before the grand jury, he told FBI Special Agent James Williamson and Philadelphia Police Department Detective James Dambach, who was working with the FBI, that: "[O]ne of the other officers standing at the rear of the EPW [Emergency Patrol Wagon], P/O LAMONT FOX said something to the effect of 'Uh-oh, here we go again', and proceeded to remove his name tag, and cover his badge with aluminum foil." Pl. Supp. (Docket No. 39), Ex. A.

On August 6, 1997, six days before her grand jury testimony, O'Leary told Williamson and Dambach that "there were four or five other officers in the vicinity." Pl. Supp. (Docket No. 41), Ex. G, at 2. She neither named Fox, nor identified the officers as members of Five Squad.

McGrath appeared before the grand jury on August 12,

1997. He testified that Fox was in the area during the alleged assault, and that McGrath "remember[ed] him saying something just before Sergeant Vassallo got in the wagon like ut-oh [sic], here we go again." Pl. Supp. (Docket No. 39), Ex. C, at 16. McGrath also testified that Fox 'put a piece of aluminum foil over his badge, and . . . wasn't wearing his nameplate." Id. at 17.

O'Leary also appeared before the grand jury on August 12, 1997. She made no mention of Fox in her testimony. When questioned as to whether there were other police personnel inside the building at 5623 Germantown Avenue, she said yes, but that "I don't specifically remember the persons. I know they were all part of 5 Squad." Pl. Supp. (Docket No. 41), Ex. H, at 6.

Fox's partner, Officer Charles Yeiter, testified before the grand jury that both Fox and he were at the 5623 Germantown Avenue location, that Fox was wearing his nameplate and badge, that he never saw Fox cover his badge with aluminum foil, and that he never heard Fox say "here we go again." Def. Ex. 16, at 4, 5, 9-12.

Another Five Squad member, Officer Michael Harvey, also testified before the grand jury that he "remember[ed] Officer Fox, Yeiter, and Sergeant Gatter" being present at the 5623 Germantown Avenue location on April 20, 1993. Def. Reply Br., Ex. 1, at 5.

Fox was subpoenaed to testify before the grand jury by subpoena dated July 30, **1997**. When Williamson and Dambach served the subpoena, Fox informed them that he had no recollection of the events of April 20, **1993**, and asked to see paperwork on the arrest in question. Fox was never provided with this paperwork.

Williamson and Dambach told him that as a Philadelphia police officer he was required to testify before the grand jury. Although Fox's attorney advised him to invoke the Fifth Amendment, **Fox** "was sure" that he could not refuse to testify or he would be fired pursuant to police department policy. Pl. Opp'n Br., Ex. B, at 4.

Fox testified before the grand jury on August **19,** 1997. He denied any knowledge of the alleged assault, denied any recollection of being present, and stated that he had never seen Vassallo assault an arrestee. He also testified that he had never put tin foil over his badge.

The grand jury indicted Fox for two counts of perjury, based on his grand jury testimony. At Fox's trial, McGrath repeated his earlier statements, and O'Leary testified that Fox was present at the scene **of** the alleged April 20, 1993 assault. Fox was acquitted of all criminal charges.

Fox and his wife, Laura Fox, filed suit in the Court of Common Pleas of Philadelphia County on September **1, 1999**. The

case was removed to this Court. The federal claims against McGrath and O'Leary are based on 42 U.S.C. § 1983 (theories of false arrest, malicious prosecution, and conspiracy) and 42 U.S.C. § 1985(3) (conspiracy to deprive Fox of the equal protection of the laws). State claims against McGrath and O'Leary are for false arrest, malicious prosecution, intentional infliction of emotional distress, civil conspiracy, and willful misconduct and/or actual malice. There is a federal and a state claim against the City of Philadelphia for violation of constitutional provisions prohibiting compelled self-incrimination, and Laura Fox brought a claim for loss of consortium against all defendants.[3]

II. Analysis

My colleague, Judge Marvin Katz, decided a case with nearly identical facts involving many of the same parties. See Gatter v. Zappile, 54 F. Supp. 2d 454 (E.D. Pa. 1999), aff'd, Case No. 99-1891, (3d Cir. June 16, 2000). McGrath and O'Leary testified at the grand jury that they had complained about Vassallo's conduct on the night of the arrest to their

[3] Because Laura Fox's only claim is a state claim, which the Court will remand, the Court will use the word "plaintiff" in this Memorandum to refer to Lamont Fox only.

supervisor, Officer William Gatter. Gatter testified that he remembered nothing about the incident. He was indicted for perjury, but was acquitted at trial. Gatter, 54 F. Supp. 2d at 455.

Judge Katz dismissed the complaint as against McGrath and O'Leary, finding that the allegations stated only that they conspired to offer false testimony and finding that such a conspiracy was entitled to absolute witness immunity. Judge Katz also denied Gatter's requests for reconsideration of the dismissal and for the opportunity to file an amended complaint that alleged that O'Leary and McGrath provided information during the investigative process that was not entitled to immunity.

A. 1983 Claims

McGrath and O'Leary argue that they are entitled to absolute immunity for their testimony, and that the claims against them fail as a matter of law for lack of causation, lack of a showing of malice, and lack of a showing of any illegal conspiracy. The City argues that no policy compelled Fox to make any statements in violation of his Fifth Amendment rights.

1. McGrath and O'Leary

The plaintiff's 1983 claims rest on statements allegedly made by McGrath and O'Leary. The first issue to be decided is which statements of the individual defendants, if any, are entitled to absolute immunity. The plaintiff relies on three statements of McGrath and two statements of O'Leary.

The statements of McGrath on which the plaintiff relies are:

- Investisation: to Martin, on March 31, 1997, that Fox and Yeiter may have been present at the scene of the Jones arrest. Def. Ex. 3A, at 1.

- Pre-Grand Jury: to Williamson and Dambach on August 6, 1997, that Fox was present at the scene of the arrest, that he said something to the effect of "uh-oh, here we go again," removed his name tag, and covered his badge with aluminum foil. Pl. Supp. (Docket No. 39), Ex. A.

- Grand Jury: to the federal grand jury, on August 12, 1997, that he saw Fox in the area of the wagon, that Fox said "ut-oh [sic], here we go again," that he put a piece of aluminum foil over his badge, and that he was not wearing a nametag. Id., Ex. C, at 16-17.

The statements of O'Leary on which the plaintiff relies are:

- Investisation: to Martin, on April 3, 1997, that there were other Five Squad officers at 5623 Germantown Avenue on April 20, 1993, but that she could not recall which specific officers. Def. Ex. 3B, at 1.

- Pre-Grand Jury: to Williamson and Dambach, on August 6, 1997, that there were four or five other officers in the vicinity at 5634 Germantown Avenue on April 20, 1993. Pl. Supp. (Docket No. 41), Ex. G, at 1.

The plaintiff does not rely on any trial testimony of McGrath or O'Leary, because Fox concedes that the defendants have absolute immunity for trial testimony. See Briscoe v. LaHue, 460 U.S. 325 (1983). In Briscoe, the Supreme Court held that police officers are absolutely immune from section 1983 liability for testimony given at a criminal trial, including perjured testimony. The Supreme Court noted that absolute immunity was accorded to witnesses in judicial proceedings at common law, and determined that the need to protect the integrity of the truth-seeking function warranted extending that immunity to suits under 1983. See id. at 330-341.

This Court holds that absolute immunity applies to grand jury as well as trial testimony. All of the Courts of Appeals that have decided the issue have held that witnesses who testify before a grand jury are entitled to such immunity.[4] See,

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[4] Some Courts of Appeals recognize a complaining witness exception to absolute immunity for grand jury testimony. See Cervantes v. Jones, 188 F.3d 805, 809 (7th Cir. 1999); Anthony v. Baker, 955 F.2d 1395, 1400-01 (10th Cir. 1992); White v. Frank, 855 F.2d 956, 958-59 (2d Cir. 1988). The plaintiff conceded that the Third Circuit has not recognized a complaining witness exception for testimony. See Kulwicki v. Dawson, 969 F.2d **1454,**

e.g., Frazier v. Bailey, 957 F.2d 920, 931 n.12 (1st Cir. 1992); Anthony v. Baker, 955 F.2d 1395, 1400-01 (10th Cir. 1992); Little v. Seattle, 863 F.2d 681, 684 (9th Cir. 1988); Strength v. Hubert, 85 F.3d 421, 423 (11th Cir. 1988), overruled on other grounds by Whiting v. Taylor, 85 F.3d 581, 584 n.4 (11th Cir. 1996); Macko v. Byron, 760 F.2d 95, 97 (6th Cir. 1985); Kincaid v. Eberle, 712 F.2d 1023 (7th Cir. 1983) (per curiam); Briggs v. Goodwin, 712 F.2d 1444, 1448-9 (D.C. Cir. 1983).

Another Judge of this Court and other courts in this Circuit have reached the same conclusion. See Gatter, 54 F. Supp. 2d at 456; Ali v. Person, 904 F. Supp. 375, 378 (D.N.J. 1995); Pansy v. Preate, 870 F. Supp. 612, 629-30 (M.D. Pa. 1994), aff'd without op., 61 F.2d 896 (3d Cir. 1995).

The Supreme Court has articulated a two-part "functional approach" for determining when absolute immunity should apply under section 1983. Buckley v. Fitzsimmons, 509 U.S. 259, 268-69 (1993). First, courts are to examine whether the function at issue was accorded common law immunity at the time of section 1983's enactment. Second, if immunity did exist at common law, courts are to determine whether the history or

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1467 n.16 (3d Cir. 1992); Pl. Opp. Br. at 13 n.9 (Docket No. 30). Even if it did, this case does not involve any complaining witnesses.

purpose of section 1983 counsels against recognizing the immunity. See id.

The common law did provide absolute immunity to witnesses testifying before the grand jury at the time of section 1983's enactment. See, e.g., The King v. Skinner, 1 Lofft 55, 56, 98 Eng. Rep. 529, 530 (K.B. 1772); Kidder v Parkhurst, 3 Allen 393, 396 (Mass. 1862); Schultz v. Strauss, **106** N.W. 1066, 1067 (Wis. 1906); Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Colum. L. Rev. 463, 488 n.78 (1909).

The history and policies of section 1983 **do** not counsel against recognizing the immunity. The Third Circuit has already recognized the importance of immunity from 1983 liability in pre-trial settings. In Williams v. Hepting, 844 F.2d 138, 143 (3d Cir. 1988), the Court of Appeals extended absolute immunity to witnesses in preliminary and suppression hearings. It recognized the fundamental function witnesses serve in the administration of justice, and the importance of full disclosure of all pertinent information – disclosures which might be compromised if witnesses were subject to the threat of damages for their testimony. See id. at **141** (citing Brawer v. Horowitz, 535 F.2d 830, 837 (3d Cir. 1976)). It also stated that the need for unfettered testimony applies "'with equal force whenever a witness testifies in a judicial proceeding the function of which is to ascertain factual

information.'" Williams, 844 F.2d at 143 (quoting Briggs v. Goodwin, 712 F.2d at **1448-9).**

The grand jury is integral to the judicial phase of the criminal process. **As** in other proceedings, absent immunity, grand jury witnesses might feel reluctant to testify truthfully or completely, for fear **of** exposing themselves to liability. Moreover, there are sufficient procedural protections, including testimony under oath and the threat of perjury, to protect the integrity of the process. Any statements made by McGrath or O'Leary as part of their grand jury testimony are entitled to absolute immunity.

The other statements made by McGrath and O'Leary were not made in a judicial proceeding. Each made a statement to Martin during the IAD investigation, and to Williamson and Dambach six days before their grand jury testimony. Because the Court has not found any case holding that, at common law, individuals were absolutely immune for their responses during an investigation, the officers are not entitled to absolute immunity for their investigative statements to Martin. See Buckley, *509* U.S. at *269.*

The officers' pre-grand jury statements to Williamson and Dambach present a closer question. The Supreme Court has recognized absolute immunity for preparation of testimony by a

prosecutor in a pre-grand jury situation. See Buckley, 509 U.S. at 273; see also Kulwicki v. Dawson, 969 F.2d 1454, 1465 (3d Cir. 1992) (citing Rose v. Bartle, 871 F.2d 331, 344 (3d Cir. 1989)). The Court need not decide this novel issue, however, because the Court holds that a reasonable factfinder could not find proximate causation between McGrath's and O'Leary's statements and Fox's alleged injuries. See Hedges v. Musco, 204 F.3d 109, 121 (3d Cir. 2000).

To establish proximate causation under section 1983, a plaintiff must demonstrate a "plausible nexus" or "affirmative link" between the defendant's conduct and the deprivation of rights. Id. (citing Bielevicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990) (internal citations omitted)).

No reasonable juror could find O'Leary's statements proximately caused Fox's arrest and prosecution for perjury. O'Leary made no statements at all to the IAD, FBI, or grand jury regarding Fox. Fox contends that (1) O'Leary was present when McGrath's statement was being taken by Martin, and she failed to contradict him when he stated that Fox may have been at the scene of the arrest, and (2) she told the IAD that she recalled other Five Squad officers being at the scene. The Court knows of no authority holding that O'Leary had an obligation to correct McGrath if she heard him. As to her investigative statement that

other Five Squad members were on the scene, she did not even mention Fox's name. She was only one of several officers who noted that Five Squad members were in the vicinity.

Nor could a reasonable juror find that McGrath's statements proximately caused Fox's arrest and prosecution for perjury. The behavior about which McGrath provided information - Fox's potential presence at the assault - did not form the basis for Fox's prosecution. Rather, it was an unrelated act - Fox's own testimony before the grand jury - for which the grand jury indicted Fox. McGrath did not cause Fox to testify in any particular way. Cf. Bodine v. Warwick, 72 F.3d 393, 400 (3d Cir. 1995) (independent action of third person in 1983 action is superceding cause that defeats proximate causation).

The cases on which the plaintiff relies to argue that McGrath's action caused the malicious prosecution and false arrest are inapposite. See Gallo v. City of Philadelphia, **161** F.3d 217, 220 n.2 **(3d** Cir. 1998); Griffiths v. CIGNA Corp., 988 F.2d 457, 464-65 (3d Cir. 1992), overruled on other grounds by Miller v. CIGNA Corp., 47 F.3d 586 (3d Cir. 1995); Campbell v. Yellow Cab Co., 137 F.3d 918, 920-21 **(3d** Cir. **1943);** Telepo v. Palma Twp., **40** F. Supp. 2d 596, **610-11** (E.D. Pa. 1999); Torres v. McLaughlin, 966 F. Supp. **1353, 1364-66** (E.D. Pa. 1997), rev'd on other grounds, 1632 F.3d 169 **(3d** Cir. 1998); Bragle v. Revell,

674 F. Supp. 13, 15 (W.D. Pa. 1987). In each of those cases, the plaintiff was prosecuted or arrested not for perjury, but for the substantive crime described in the allegedly false statements.

Even were this not so, because Fox's arrest and prosecution stemmed from his own testimony before the grand jury, he must show that McGrath's statements caused or substantially caused Fox to be called to testify in the first place.'

Fox's federal grand jury subpoena is dated July 30, 1997. Def. Ex. 4. Therefore, McGrath's pre-grand jury August 6, 1997 statement is irrelevant.

That leaves only McGrath's March 31, 1997 investigative statement, in which he said that he believed that Yeiter and Fox were at the arrest location. It would be speculation for a juror to infer that this statement caused or substantially caused Fox to be subpoenaed. First, this statement is equivocal - McGrath said that he was unsure who the officers were, but thought they might have been Yeiter and Fox.

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[5] Causation comprises both cause-in-fact and proximate cause. W. Page Keeton et al., Prosser and Keeton on Torts § 41, at 264-269 (5th ed. 1984). To establish cause-in-fact, a plaintiff must introduce evidence providing a reasonable basis for the conclusion that the defendant's conduct more likely than not caused, or substantially caused, the result. Id. § 4, at 269.

Second, there is ample other information in the record that places **Fox** or other Five Squad members on the scene. In the IAD report turned over to the **FBI**, other officers, including **Fox's** own partner, Yeiter, linked **Fox** to the scene. Other officers also corroborated the presence of Five Squad members on area rooftops at around the time of the incident. Def. **Ex. 3C**, at **12**, 14. Even absent that other evidence, it is wholly logical that Fox, as a Five Squad member, would be called to testify about the night in question, because of Vassallo's position as the sergeant in charge of the squad.

Neither McGrath's nor O'Leary's actions, statements, or omissions provide sufficient evidence to support an inference of any conspiracy. "To demonstrate **a** conspiracy under § **1983**, a plaintiff must show that two or more conspirators reached an agreement to deprive him or her of a constitutional right 'under color of law.'" Parkway Garage, Inc. v. City of Phila., **5 F.3d** 685, **700** (3d Cir. **1993)** (citing Adickes v. S.H. Kress & Co., **398 U.S. 144, 150 (1970)).** There is insufficient evidence from which a reasonable jury could infer any agreement.[6]

[6] The Court notes that the plaintiff's conspiracy claim was weakened substantially by his concession that there was inadequate evidence to maintain charges against Martin, against whom he had also originally asserted a conspiracy claim.

2. City of Philadelphia

Fox's 1983 claim against the City of Philadelphia is based on the existence of Home Rule Charter 10-110,[7] which the plaintiff claims compels police officers to testify in legal proceedings or face termination, in violation of the Fifth Amendment. The defendants argue that: (1) Section 10-110 has been modified in practice because it was effectively overruled by United States Supreme Court precedent; and (2) the City did not compel Fox to testify.

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[7] Section 10-110 reads:

> If any officer or employee of the City shall willfully refuse or fail to appear before any court, or before the Council or any committee thereof, or before any officer, department, board, commission or body authorized to conduct any hearing or inquiry, or having appeared, shall refuse to testify or answer any question relating to the affairs or government of the City or the conduct of any City officer or employe on the ground that his testimony or answers would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any matter about which he may be asked to testify before such court or at any such hearing or inquiry, he shall forfeit his office or position, and shall not be eligible thereafter for appointment to any position in the City service.

351 Pa. Code §10.10-110.

Section 10-110 on its face does appear to conflict with Supreme Court precedent. See Uniformed Sanitation Men Assoc. v. Commissioner of Sanitation, 392 **U.S.** 280, 284-5 (1968); Gardner v. Broderick, 392 **U.S.** 273, 278 (1968); Garrity v. State of New Jersey, 385 **U.S.** 493, 500 (1967). In light of this case law, Pennsylvania courts have limited application **of** Section 10-110. See Commonwealth v. Triplett, 341 A.2d 62, 64 (Pa. 1975); DiCiacco v. Civil Service Commission, 389 A.2d 703, 708 (Pa. Commw. 1978).

John Norris, the Deputy Commissioner of the Internal Affairs Bureau of the Philadelphia Police Department stated that in taking statements from officers, the Department specifically references Garrity and Miranda. The City does not terminate police officers because they assert their Fifth Amendment privilege and requires no waiver of immunity. Section 10-110 is not used at all when taking statements from police officers. Norris Dep., Def. **Ex.** 12, at 22, 29-31, 33, 45, 59-60, 67, 72, 74, 75.

The Department's policy, pursuant to Section **1.11** and 1.12 of the Disciplinary Code, is that a police officer can only be disciplined or discharged if he or she refuses to participate in an administrative proceeding - not a criminal matter. If a police officer is the "target" **of** a criminal investigation, the

department does not compel a statement that can be used against him. Rather, the officer is given Miranda warnings and is not compelled to give a statement. Norris Dep. at 10-12, 72; Def. Ex. 13B, at 3, note. The evidence submitted by the defendants establishes that there was no policy of terminating police officers who assert their Fifth Amendment rights.

In an attempt to create a disputed issue of material fact on the existence of a city policy, the plaintiff relies on the declarations and depositions of three current or former police officers.

Officer Jeanette Dooley, a Captain at the police department, stated that it was her understanding that the City had a custom, policy, or practice of requiring officers to testify, or face dismissal. Pl. Opp'n Br., Ex. C. In a deposition, she referenced a directive that she believed prohibited officers from asserting the Fifth Amendment before a grand jury, but did not know why she believed that or who had told her so. Pl. Supp. (Docket No. 41), Ex. D, at 39.

James McDevitt, a former police officer and the Vice-President of the Fraternal Order of Police, stated in a declaration that he, too, understood that Philadelphia police officers were required to give testimony or face termination. Id., Ex. D. In a deposition, he stated that "it is common

knowledge throughout the Philadelphia Police Department as an active police officer that you must cooperate in any investigation that you are called upon to cooperate in. If you don't, you will be fired." Pl. Sur-reply, Ex. C, at 41. McDevitt also said that he told Fox that "he had to testify" and that "if he refused to testify they'd probably fire him." Id. at 56.

Officer Thomas Peters, a member of the police department for around twenty years, testified in a deposition that, if a police officer refuses to testify in a judicial proceeding, "disciplinary action can be taken against [the officer], and I believe it leads up to [termination] not the first time, but eventually leads to that." Pl. Supp. (Docket No. 35), Ex. C, at 150.

Because none of these individuals is a policymaker, and their testimony does not state that any policymakers acquiesced in the alleged policies they describe, the testimony does not establish the existence of any official policy or custom. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1480-82 (3d Cir. 1990).

In addition, **Fox** was not forced to testify before the grand jury by section **10-110**. **Fox** admits that Section 10-110 was

never mentioned to him by anyone.[8] Fox was unaware of any police officer who had been terminated for asserting his Fifth Amendment privilege. His lawyer had advised him to assert the Fifth Amendment privilege; Fox ignored the advice.[9]

The Court, therefore, will grant summary judgment for the City of Philadelphia as to the plaintiff's federal claims.

B. 1985(3) Claim

To succeed on a section 1985(3) claim, a plaintiff must show: (1) a conspiracy; (2) motivated by racial or class-based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons to the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the

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[8] Fox has stated that Dambach and Williamson told him that he had to testify, but did not say that they referenced section 10-110. Even so, Dambach was not a policymaker or superior officer of Fox, and so his statement cannot indicate compulsion pursuant to any City policy or custom. Williamson's statement is irrelevant, because he worked for the FBI, not the City.

[9] The Court also notes that the grand jury subpoena that Fox received included an advice of rights, explaining that, as a witness before the grand jury, he could refuse to answer any question if answering truthfully would incriminate him. At the grand jury, before **Fox** was questioned, the prosecutor **asked** him whether he understood that he had the right to remain silent before the grand jury; Fox said "I do." Def. Ex. **4**, at ***2;*** Def. Ex. 7, at 2.

deprivation of any right or privilege of a citizen of the United States. United Brotherhood of Carpenters and Joiners of America v. Scott, 463 U.S. 825, 828-29 (1983).

Defendants move for summary judgment on the first two prongs. The Court will grant the motion. There is insufficient evidence *of* an agreement between the defendants. Nor could a reasonable juror infer that any of the alleged conduct was motivated by race. Both the plaintiff and the victim of the alleged assault are African-American. Vassallo, the initial target of the IAD investigation and grand jury, is white. Gatter, who, like Fox, was subpoenaed, indicted, and arrested for perjury, is white. Fox himself admitted that he had no reason to believe that O'Leary or McGrath took any actions against him because of his race.

Because this Court is dismissing all federal claims, it will remand all state claims to the Court of Common Pleas of Philadelphia County.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAMONT FOX and LAURA FOX, h/w : CIVIL ACTION

v.

JOHN McGRATH, et al. NO. 99-4838

O R D E R

AND NOW, this 12th day of June, 2002, upon consideration of the Defendants' Motion for Summary Judgment (Docket No. 27), the plaintiffs' response thereto, subsequent filings by both parties on the motion, and following oral argument, IT IS HEREBY ORDERED THAT the motion is GRANTED as to the federal claims, for the reasons set forth in a Memorandum dated today. Judgment is entered in favor of the defendants and against the plaintiff as to all federal claims. The state claims are remanded to the Court of Common Pleas of Philadelphia County.

BY THE COURT:

Mary A. McLaughlin

MARY A. McLAUGHLIN, J.